(13)

No. 95-1340

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

HUGHES AIRCRAFT COMPANY
Petitioner,

VS.

UNITED STATES EX REL. WILLIAM J. SCHUMER
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FMC CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER HUGHES AIRCRAFT COMPANY

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Pursuant to Supreme Court Rule 37.3, *amicus curiae* FMC Corporation ("FMC") urges the Court to reverse the Ninth Circuit's ruling in *United States ex rel. Schumer v. Hughes Aircraft Co.* This brief addresses solely whether the 1986 repeal of the Government knowledge defense, 31 U.S.C. § 3730(b)(4) (1982), can be applied retrospectively to suits alleging violations of the False Claims Act that occurred before the repeal. This brief is filed with the consent of both Petitioner and Respondent.

INTEREST OF THE *AMICUS CURIAE*

FMC Corporation is a publicly traded corporation that manages a diverse portfolio of businesses that includes the design and production of armored vehicles and related

supplies. Since 1942, except for a break between World War II and the Korean War, FMC's factories have continuously produced armored vehicles for the United States military. During that time, FMC has been awarded the contracts to produce evolving versions of the Army's main armored personnel carrier and the Marine Corps' primary armored amphibious vehicle. Today, through United Defense LP, a partnership between FMC and Harsco/BMY, FMC builds, among other vehicles, the Bradley Fighting Vehicle, the M113 armored personnel carrier, and the Marine Corps' P7 amphibious vehicle.

On September 9, 1986, FMC engineering test analyst Henry J. Boisvert, who had been recently laid off, filed a *qui tam* lawsuit against FMC alleging violations of the False Claims Act related to the production of the Bradley Fighting Vehicle. *United States ex rel. Boisvert v. FMC Corp.*, No. C-86-20613 WAI (N.D. Cal.). On October 27, 1986, while the Justice Department was investigating Mr. Boisvert's allegations, the Government knowledge defense to such lawsuits was repealed by the False Claims Amendments Act of 1986, Pub. L. No. 99-562, 100 Stat. 3153 ("the 1986 Amendments"). After the Justice Department declined to join Mr. Boisvert's suit, FMC brought a motion to determine that the Government knowledge defense applied to the *Boisvert* case, notwithstanding its repeal. The District Court ruled that the defense applied because its elimination by the 1986 Amendments impaired FMC's substantive rights. *United States ex rel. Boisvert v. FMC Corp.*, No. C-86-20613 WAI, 1987 U.S. Dist. LEXIS 13549 (N.D. Cal. Sept. 8, 1987). The District Court later applied the Government knowledge defense to dismiss twenty-one of the thirty-two alleged false claims. Several years later, the Ninth Circuit decided *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), and *Hyatt v. Northrop Corp.*, 80 F.3d 1425 (9th Cir. 1996), *petition for cert. filed* (U.S. July 2, 1996)

(No. 96-17). Based on *Schumer* and *Hyatt*, Mr. Boisvert has moved to reinstate fifteen of the twenty-one allegations previously dismissed.

Unless the Court reverses *Schumer* or *Hyatt*, FMC and other Government contractors face the prospect of mounting, at great cost, a substantive defense to allegations which would have been dismissed on Government knowledge grounds. FMC submits this *amicus* brief to bring to the Court's attention the practical impact of the repeal of the Government knowledge defense.

SUMMARY OF THE ARGUMENT

In *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct. 1483 (1994), the Court established the criteria for determining when, in the absence of clear legislative direction,[1] a statute may be applied retroactively to conduct that took place before its enactment. FMC's *amicus* brief demonstrates that, in the context of Government contracts, the Government knowledge defense provided an important and reliable shield for contractors to avoid *qui tam* actions by unhappy employees and strangers to the Government contracting process. In setting forth the test in *Landgraf*, the Court stated that each case requires a particularized analysis to examine "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event," noting that "familiar considerations of fair notice, reasonable reliance and settled expectations offer sound guidance." *Id.* at 1499. But, in *Schumer*, the Ninth Circuit ignored this direction and guidance. The court completely failed to take account of the

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1. Neither the language of the statute nor congressional intent supports retroactive application of the 1986 Amendments. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1517 (9th Cir. 1995); *United States v. Murphy*, 937 F.2d 1032, 1037 (6th Cir. 1991).

vast difference to a Government contractor between dealing with the Government with respect to problems that arise in the course of performing complex Government contracts, and dealing with a relator as to those problems.

Before October 1986, a business such as FMC which contracted with the United States Government could rely on its close cooperation with the Government to protect it from *qui tam* False Claims Act suits. Government contractors gave Government inspectors and administrators wide ranging access to the daily operations of their programs, well beyond the access given to commercial customers. In return, a Government contractor could be assured that any problem would be resolved by someone familiar with both the broad context and the narrow details of the program -- and, even more significantly, with the flexibility to apply the appropriate remedies to fix the problem. If a relator did bring suit, the contractor could easily dispose of it by presenting evidence that the Government already possessed the information upon which the suit was based. This defense provided strong protection to Government contractors from strike suits, and allowed the Government to control the resolution of disputes over false claims that arose during the normal day to day administration of Government contracts.

When Congress amended the False Claims Act in October 1986, this protection against strike suits evaporated for both contractors and the Government. After October 1986, Government contractors were forced to spend millions of dollars defending against *qui tam* suits which the Justice Department decided did not merit intervention -- the vast majority of which turn out to be groundless.

Into this stark reality the Ninth Circuit has introduced the fanciful myth that the Government knowledge defense had no effect on the substantive rights of Government contractors. Careful analysis shows that eliminating the Government

knowledge defense for conduct that took place before the 1986 Amendments would have impermissibly retroactive effect under *Landgraf*. The repeal of this defense by the 1986 Amendments did in fact "attach new legal consequences to events completed before its enactment," because it impaired rights that contractors had when they acted and increased contractor's liability for past conduct. 114 S. Ct. at 1499 and 1505. The repeal took away a total defense against *qui tam* suits.

Relators have attempted to confer retroactive effect on the repeal of the defense by referring to language in *Landgraf* which exempted jurisdictional statutes from the traditional presumption against retroactivity. Although the Government knowledge defense was at one time labeled jurisdictional,[2] it never was jurisdictional in practice because it did not govern the power of a court to hear a False Claims Act case. Thus, *Landgraf*'s traditional presumption requires prospective application of the 1986 provision repealing the defense.

Based on the serious substantive change to the Government contracting environment rendered by the repeal of the Govegnment knowledge defense, FMC urges that the Court rule in favor of the petitioner in this case and reverse the Ninth Circuit opinion. FMC also joins Northrop Grumman in requesting that the Court reverse *Northrop Grumman v. United States ex rel. Hyatt, petition for cert. filed* July 1, 1996 (No. 96-17), or grant, vacate and remand *Hyatt* to the Ninth Circuit to reconsider the retroactive effect in cases filed *before* the 1986 Amendments.

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2. As demonstrated in Section V below, during the relevant period in the *Schumer* case the statute did not even bear the jurisdictional label.

ARGUMENT

I. Under the Government Knowledge Defense, the Systematic Release of Information to the Government As Part of Regular Contract Administration Protected Government Contractors from Strike Suits

The Ninth Circuit in *Schumer* failed to consider the actual real-world effect of the prior Government knowledge defense in the context of Government contracts. Government contractors must do business with a sovereign that has regulatory and criminal enforcement powers to supplement its power to contract. Frequently, and especially in the defense industry, the Government also bargains from the strength of being the sole customer. The Government has used this power to insert into its contracts more detailed and onerous oversight provisions than encountered in private transactions, and to require compliance with social and policy provisions that would not be accepted in transactions between private parties.[3] The sheer number of provisions creates a great risk in a complex development project of being out of compliance with at least some of them. With the False Claims Act added to that mix, doing business with the United States involves significant risk. That risk threatens "the Government's own long-run interest as a reliable contracting partner in the myriad workaday transaction of its agencies." *United States v. Winstar*, 116 S. Ct. 2432, 2459 (1996).

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3. The Federal Acquisition Streamlining Act of 1994 is a recent attempt to reduce over-regulation in Government contracts. Its legislative history provides an informative summary of the difficulties Government contractors face in doing business with the United States. *See* S. REP. No. 258, 103rd Cong., 2d Sess. 2-3 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2561, 2562-63; S. REP. No. 259, 103rd Cong., 2d Sess. 1-3, 5-6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2598, 2598-603.

To reduce that risk, Government contractors systematically and continuously inform the Government of every step during the normal course of contract administration -- and the Government responds. Appellate opinions in *qui tam* cases repeatedly describe this reciprocal information flow. For example, in *United States ex rel. Butler v. Hughes Helicopters, Inc.*, 71 F.3d 321 (9th Cir. 1995), the relator alleged deficiencies in the contractor's testing of the Apache helicopter. The facts of that case showed, however, that the Government knew as much as the contractor did about the alleged problems. In affirming summary judgment for the contractor on the merits, the Ninth Circuit described how, before conducting tests, Hughes Helicopter had submitted its test plans to the Army, Army technical representatives had witnessed the tests and reviewed flight test reports, and Army representatives had attended pre- and post-test briefings. The Ninth Circuit concluded that the Army was always aware of problems that arose before acceptance of each helicopter. *Id.* at 324. The court quoted at length the following District Court finding:

> [t]he overwhelming evidence established a pattern of cooperation between the Army and [the contractor] during the course of a complicated, sophisticated, and highly technical military procurement program. The evidence established that information flowed freely between [the contractor] and the Army concerning the testing of the Subsystems, including information regarding deviation from Test Plans, failures to pass tests, and difficulties with some of the Subsystems. The evidence established that all information upon which [Butler] bases his case was not only available to the Army, but in the Army's possession.

Id. at 326.

The elaborate exchange of information inherent in the close working relationship between contractors and the Government was also evident in the joint effort of FMC and the Army to design and build the Bradley Fighting Vehicle. In another case involving the Bradley program, the Ninth Circuit described what occurred on one engineering project:

> The government knew of all the deficiencies identified by Wang, and discussed them with FMC. The fact that the government knew of FMC's mistakes and limitations, and that FMC was open with the government about them, suggests that while FMC might have been groping for solutions, it was not cheating the government in the effort.

Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992).

This intimate Army-FMC cooperation also persuaded the District Court in *Boisvert* to dismiss two-thirds of the relator's allegations based on Government knowledge during the Bradley's development and testing. The Army maintained a large staff at FMC's San Jose facility to implement its power to approve each step of the design and to oversee detailed inspection and testing on every Bradley that was delivered. The level of communication between FMC and the Army was evidently not apparent to Mr. Boisvert, a test analyst with no managerial responsibilities. The Justice Department examined the validity of Mr. Boisvert's allegations and chose not to support them. Once that had occurred, the existence of the Government knowledge defense in the Government contracting environment gave FMC the fair expectation that its programmatic cooperation with the Government would cut off a suit by the relator on the same allegations.[4]

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4. Other cases demonstrate that the systematic release of information to the Government was the norm for Government contractors. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995) (Government learned of commonality agreements when contractor informed and secured the approval of the Air Force); *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1405-06 (9th Cir. 1995) (Government acquired the information that would have satisfied the Government knowledge defense through normal quality control audits); *United States ex rel. Schwedt v. Planning Research Corp.*, 59 F.3d 196 (D.C. Cir. 1995) (relator received information on which he based his suit as the Government official responsible for overseeing the contract at issue); *United States ex rel. Anderson v. Northern Telecom, Inc.*, 52 F.3d 810, 816 (9th Cir. 1995) (Government received information showing no false claim during contractor's year and a half effort to bring its switches up to a level of performance satisfactory to the Army).

Thus, prior to the 1986 Amendments, Government contractors reasonably expected that exchanges of information inherent in normal contract administration would protect them from *qui tam* litigation on claims not serious enough to require Justice Department intervention. This expectation creates a right to the Government knowledge defense that would be impaired by retrospective application of its repeal. "Familiar considerations of fair notice, reasonable reliance and settled expectations," *Landgraf*, 114 S. Ct. at 1505, require that the Government knowledge defense continue to protect Government contractors' pre-Amendment conduct.

II. The Repeal of the Government Knowledge Defense Increased Government Contractors' Liability for Conduct Before the Repeal by Increasing Both the Number of Meritless Suits and the Cost of Defending Them

The repeal of the Government knowledge defense forces Government contractors to defend on the merits increasing numbers of groundless cases relating to conduct that occurred

prior to the 1986 repeal. As a rule, if the Justice Department evaluates a *qui tam* case as meritless or not worth pursuing, it does not seek dismissal. Instead, it simply declines to intervene, and this permits the relator to go forward with the case. If the Government knowledge defense does not apply, Government contractors must litigate such meritless cases through summary judgment or trial, after extensive discovery on the merits of the relator's allegation. The contractor must make a systematic presentation of evidence about the context of the Government contracting process to convince a judge or jury that the contractor's conduct was not a false claim. The proof must be even more detailed if the contractor's product experienced performance or design problems that the contractor fixed with the Government in a mutually acceptable resolution of the problem. During the time that Government contractors enjoyed the protection of the Government knowledge defense, they experienced none of this extra effort, expense, and risk.

United States ex rel. Butler v. Hughes Helicopters, Inc., 71 F.3d 321 (9th Cir. 1995), is a powerful example of the kind of additional burden that the 1986 Amendments placed upon Government contractors. The Ninth Circuit agreed with the District Court that the Government possessed the relevant information about the relator's allegations so that the contractor would have qualified for the Government knowledge defense if the pre-Amendment False Claims Act were applied. *Id.* at 326. However, the contractor was required to go through full pre-trial litigation and discovery and ten days of jury trial before the District Court rendered a directed verdict in its favor. *Id.* at 323. Other recent *qui tam* cases to which the Government knowledge has not been applied also required extensive discovery and summary judgment or trial. *See Wang*, 975 F.2d at 1415 ("significant amount of discovery" with the production of "thousands of documents"; summary judgment for contractor); *Anderson*, 52

F.3d at 810, 812 (appeal not heard until four years of litigation; summary judgment for contractor); *Lindenthal*, 61 F.3d at 1405 (contractor sought $200,000 in costs alone and was awarded $50,271.27; bench trial for contractor on merits); *Schumer*, 63 F.3d at 1516, 1526 (three years of litigation before the close of summary judgment briefing; summary judgment for contractor).[5]

Requiring Government contractors to fully litigate meritless suits based on events that occurred before October 1986 increases the contractors' monetary liability for conduct that occurred before the enactment of the 1986 Amendments. The ability to dismiss a groundless allegation before detailed discovery and without the uncertainty of a jury trial is of significant practical value to Government contractors. The volume of increased resources that must be committed to defending suits that were groundless from the beginning makes retrospective application of the repeal of the Government knowledge defense impermissibly retroactive.

III. Repealing the Government Knowledge Defense for Government Contractors' Conduct That Occurred Before the Amendments Would Eliminate a Material Defense

Repeal of the Government knowledge defense impaired contractors' substantive right to a complete defense against

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5. The impact of the Government knowledge defense on meritless cases is also reflected in the Ninth Circuit's two *Hagood* opinions. In *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991), the complaint itself pleaded that the Government knew about the alleged false claim. The Ninth Circuit overturned the District Court's ruling that Mr. Hagood's complaint failed to state a claim upon which relief could be granted. The defendant was then compelled to engage in five more years of litigation, until *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465 (9th Cir. 1996) upheld summary judgment on the merits of the same complaint.

relators. *Winfree v. Northern Pacific Ry. Co.*, 227 U.S. 296 (1913), prohibits retrospective application of the repeal of a defense, even if the defendant might have been otherwise liable. In *Winfree*, a railroad employee was killed, allegedly through the negligence of the defendant railway. The plaintiff was the administrator of the employee's estate. He sought relief under a federal statute enacted after the employee's death allowing suits by the administrator of the deceased employee's estate. *Id.* at 300-01. Under state law, the employee's father could also have brought a cause of action for the railroad's negligence, even before the federal statute was enacted. *Id.* at 302. The Court agreed with the argument that "there was liability on the part of the defendant for its negligence before the passage of the act of Congress, and the act has only given a more efficient and a more complete remedy." *Id.* at 301-02. Nevertheless, the Court refused to allow the administrator's action, because the statute "takes away material defenses, -- defenses which did something more than resist the remedy; they disproved the right of action." *Id.* at 302.

Winfree is a direct parallel to the situation in *Schumer*. In *Winfree*, the railroad's defense against an action by its employee's administrator was abolished by statute, although the railroad could have been sued by the employee's father. In *Schumer*, Hughes' defense against an action by a relator was abolished by the 1986 Amendments, although Hughes could have been sued by the Government. In each case, the abolition of a complete defense as to certain parties was not mitigated by the defendant's continuing liability to other parties. In *Winfree*, this Court held that a statute which discontinued a material defense to liability as to certain parties may not be applied retroactively to conduct committed prior to its enactment. This Court should reach the same result now in *Schumer*. Both cases recognize the real world truth that protection from liability to certain -- even if not all -- parties

is a valuable right. Therefore, under *Landgraf* retroactive application of the removal of that right is impermissible.

IV. The Repeal of the Government Knowledge Defense Increased the Likelihood that Government Contractors Would Face False Claims Act Liability, Rather than Less Serious Remedies Available to the Government

The Ninth Circuit's decision in *Schumer* is based on the assumption that the action brought by the relator could have been initiated by the Government. *See* 63 F.3d at 1517. This assumption fails to take account of the different remedies available to the Government as opposed to a *qui tam* relator. Even when the Government determines that it is entitled to some relief, the Government is not limited to the False Claims Act. It can proceed either under the relevant contract or select a remedy from the broad range of statutes that control the conduct of Government contractors. For example, the Government might choose to negotiate an adjustment to the contract, initiate a claim under the Contract Disputes Act, 41 U.S.C. §§ 601-13 (1988), seek a price adjustment under the Truth in Negotiations Act, 10 U.S.C. § 2306a, 41 U.S.C. § 254(d) (1992), or even seek administrative recovery under the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801-12 (1992). Each of these provides a remedy significantly less onerous than prescribed by the False Claims Act. By contrast, a relator has available only the False Claims Act with its harsh remedies of multiple damages plus penalties. Thus, even if a relator concludes that the defendant's conduct may not involve fraud, the relator's only choice is to pursue the False Claims Act action or abandon it.

From the contractor's perspective, the difference in available remedies is striking. The contractor can assume that the government will tailor the remedy it seeks to the particular conduct, taking into account all the information it has learned

during the course of contract performance. The relator, on the other hand, with only the False Claims Act tool, will not be able to make such fine distinctions.

Prior to 1986, if the Government chose a remedy other than the False Claims Act, the Government knowledge defense would assure that a *qui tam* action relating to the same subject matter would be immediately dismissed. The contractor would thereby avoid False Claims Act liability entirely -- though not, perhaps, lesser liability to the Government under a more appropriate statute. Since the repeal of the Government knowledge defense increased the likelihood that Government contractors would face the more strenuous False Claims Act liability, under *Landgraf* the 1986 Amendments can be applied only prospectively.

V. The Pre-amendment Government Knowledge Defense Was Not a Jurisdictional Provision

In deciding that the 1986 Amendments could be applied to pre-amendment conduct, the Ninth Circuit looked at the label attached to the Government knowledge defense, but not at the substantive impact of the defense. But the Government knowledge defense was not jurisdictional in the sense described in *Landgraf*. In discussing a jurisdictional exception to the presumption of prospective application of new statutes, *Landgraf* referred to statutes that "speak to the power of the court rather than to the rights or obligations of the parties." 114 S. Ct. at 1502 (quoting *Republic National Bank v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring). The Court also noted that a new jurisdictional rule normally "takes away no substantive right but simply changes the tribunal that is to hear the case." *Id.* The Government knowledge defense does not determine which court can hear a False Claims Act case. *See United States ex rel. Fallon v.*

Accudyne Corp., 97 F.3d 937, 940-41 (7th Cir. 1996). That defense completely barred a relator's action in any forum.

Even if the label "jurisdictional" were controlling, it would not apply here. The text of the Government knowledge defense contained no reference to jurisdiction at all at the time the conduct in *Schumer*, *Hyatt*, and *Boisvert* took place. In 1982, the reference to jurisdiction in the Government knowledge defense was deleted when the defense was amended to read:

> [u]nless the Government proceeds with the action, the court shall dismiss an action brought by the person on discovering the action is based on evidence or information the Government had when the action was brought.

31 U.S.C. § 3730(b)(4) (1983).[6] This change was made as part of a recodification of the entire Title 31 of the United States Code, Pub. L. 97-258, 96 Stat. 877 (1982), and remained in place until the 1986 Amendments. The House Report accompanying that recodification stated that Congress intended to "restate in comprehensive form, without substantive change" the previous code sections, and to substitute "simple language" for "awkward and obsolete terms." H.R. REP. NO. 651, 97th Cong., 2d Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895. The revision notes for the new section 3730(b)(4) state that the reference to jurisdiction was dropped "to eliminate unnecessary words."

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6. The 1943 version of the False Claims Act had read:

> [t]he court shall have no jurisdiction to proceed with any [*qui tam*] suit . . . whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought.

31 U.S.C. § 232(C) (1976).

Id. at 2039. For these reasons, the term "jurisdiction" in the Government knowledge defense should not be meaningful in an analysis of its retroactivity.

VI. Even If the Court Determines That the 1986 Amendments May Be Applied Retroactively on the Facts of *Schumer*, the Court Should Grant, Vacate, and Remand *Hyatt* for the Ninth Circuit to Address the Circumstance Where the Suit Was Filed Before the Amendments

FMC asks the Court to follow the suggestion of the Northrop Grumman reply brief in its petition for *certiorari* in *Hyatt*, and grant, vacate and remand that case for the Ninth Circuit to reconsider retroactivity in the situation in which a suit was filed before the 1986 Amendments. *Boisvert* was also filed before the effective date of those amendments, so the arguments in *Hyatt* apply to FMC's case as well.

CONCLUSION

The Ninth Circuit's holding that the 1986 Amendments to the False Claims Act may have retroactive effect in *United States ex rel. Schumer v. Hughes Aircraft Co.* should be reversed.

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Respectfully submitted,

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